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Office of the Clerk
Supreme Court of the State of Michigan
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct

Dear Clerk:

Having practiced law in the State of Michigan for over thirty-four years and having served as an Attorney Discipline Board Hearing Panel Chairperson for over twenty years, I write to register my opposition to the Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct. I am writing primarily to object to that proposed portion of the Amendment which states as follows:

> *If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim.*

Direct mail marketing has been permissible since the United States Supreme Court decision in *Shapero v Kentucky Bar Association 486 U.S. 466 (1988)*. Several years later, the state of Florida, acting primarily upon anecdotal evidence, imposed a thirty day waiting period before a law firm could utilize direct mail marketing. The anecdotal evidence was based upon conjecture and surveys about what might happen in the event a thirty day waiting period was not imposed.

The State of Michigan has had 17 years to gauge the effect of direct mail marketing without the imposition of a thirty day waiting period. As the Michigan experience demonstrates, all of the concerns and conjecture raised by the state of Florida have been proven baseless and without merit.

No firm in The State of Michigan has had more experience with direct mail marketing than my present firm (Matz and Pietsch, P.C.) and predecessor firm (Matz and Rubin, P.C.).

By way of background, I have had the priviledge of practicing law in the State of Michigan for over 34 years. From 1979 through 1988, my predecessor firm, The Law Offices of Matz and Rubin utilized a mass marketing approach (television, billboards, Yellow Page ads, magazine ads, and newspaper ads) to market our personal injury practice. Other firms did the same. We competed with one another based primarily on name recognition. There was little substantive difference in the approach of any of the attorneys who engaged in mass marketing; it was simply a race to obtain the highest name recognition.

Once the U.S. Supreme Court decided, in the case of *Shapero v. Kentucky Bar Association 486 U.S. 466 (1988),* that direct mail marketing was not considered solicitation for purposes of State Bar Disciplinary Rules, we discontinued our mass media advertising efforts and concentrated solely on direct mail. Since 1988 we have sent thousands of letters to individuals who have been involved in traffic accidents indicating our willingness and availability to assist them.

Our firm is currently one of approximately ten personal injury plaintiff firms that routinely use direct mail marketing as part of their overall marketing and advertising strategy.

BENEFITS OF DIRECT MAIL MARKETING

It is a well-accepted marketing principle that competition among service providers results in:

A. Better service
B. Lower cost

BETTER SERVICE

There is a stark contrast between the accommodations made to prospective clients pre- and-post-advertising era. Prior to 1978, an individual who was involved in a motor vehicle crash probably could not identify the name of one attorney or one law firm that specialized in personal injury claims. They might seek a referral from a union official, religious advisor or another attorney. There were rumors of kick-backs paid by personal injury attorneys to those who were in a position to refer prospective clients. Once a personal injury attorney could be located, a client would typically have to drive to that attorney's office. There was little in the way of comparison shopping. There was virtually no way for a client to research an attorney before an appointment. Frequently, the only information a client had about an attorney was information provided by the attorney himself.

Thirty-three years after *Bates*, prospective clients now have a wealth of information upon which to make an informed decision about hiring a lawyer. They can research a attorney's qualifications online, compare the websites of various law firms and read newspaper or magazine articles written by or about an attorney. A client is not reliant

upon an individual who may have an ulterior motive (i.e. kick-back) in referring a particular attorney. Clients in smaller communities who do not wish to hire a local lawyer find that they can hire a lawyer whose practice is limited to personal injury and who is willing to drive hours to meet with a client in their home or office. Our clients are able to contact us at our office, through our cell phone or via e-mail. We make ourselves available virtually 24 hours a day. This is a level of service to our clients unheard of thirty-three years ago. It is made possible by modern technology and the knowledge that if we do not provide a high level of service, clients can easily find another attorney who will.

COST

Prior to the advent of attorney advertising, personal injury attorneys throughout the Unites States basically charged the maximum the State Supreme Court permitted. In late 1970's, Michigan personal injury attorneys had a choice of two fee structures. They could either charge a cascading contingency fee with the maximum fee being 40% of the first $25,000 and a reduction in percentage thereafter, or a straight 1/3 of the net settlement. Eventually, the structured fee was modified in favor of a maximum 1/3 contingency fee. The maximum 1/3 contingency fee has continued to the present day.

One of the advantages of direct mail marketing is that our firm can afford to offer a lower contingency fee.

Since Matz and Pietsch, P.C. does not have the enormous overhead associated with television advertising, our average attorney fees have dropped from 33 1/3% of the net recovery to 22% of the net recovery. In some of the more tragic cases involving significant injury and death and a nominal insurance policy, we represent our clients for free. Another hallmark of our firm is that we do not refer cases to other attorneys for geographic reasons. It has been our privilege to meet virtually every one of our clients at their home and to have litigated cases in almost every county in the Lower Peninsula (and several in the Upper Peninsula). Our clients continue to benefit from the increased personal service and attention that comes from attorneys who answer their own phones, speak directly with clients and accept responsibility for every aspect of a client's claim. All this for a 22% contingency fee.

The only reason we are able to offer reduced fees to our clients is that we are able to contact potential clients and let them know of the availability of a reduced fee without spending millions of dollars in a mass media campaign. The Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct that would impose a thirty day waiting period before we can send our direct mail marketing would effectively eliminate our ability to make a lower fee known to a client.

RESPECT FOR THE PROFESSION

One of the arguments in favor of restricting direct mail marketing is that the advertising, in and of itself, cheapens and reduces the respect for the profession.

I am extremely proud of my thirty-four years of legal practice. For over twenty years, I have served The Attorney Discipline Board as a Hearing Panel Chairperson. I lecture on

legal issues at over three dozen high schools and colleges annually. I mentor several younger attorneys and participate in a high school intern program. In every one of my professional and personal contacts, I have recognized that my conduct reflects upon both my legal practice and the legal profession.

I would agree that I am not always comfortable with the attorney advertising I see on television, billboards or on the backstop of the Detroit Tigers baseball game. Imposing a thirty day waiting period on direct mail letters solves none of these problems. I agree with Justice Markman when he indicates:

> *...those lawyers, and law firms which engage in client solicitation by the hundreds and thousands will continue to engage in business as usual, while those lawyers and law firms which engage in client solicitation one person at a time will become more heavily regulated.*

Justice Markman goes on to correctly point out:

> *...all we are doing is placing a small firm at a increasing economic disadvantage to the large law firm in terms of client solicitation.*

It is true the imposition of a thirty day waiting period will impose an enormous economic disadvantage upon our firm to the extent that we may no longer be able to offer a 22% contingency fee. Simply put, the economic model of a mass marketing personal injury firm will not allow it to profitably practice with a reduced fee of 22%. I am unaware of any other personal injury plaintiff's law firm in this state with the economic model that allows it to charge 22%. Hundreds of clients who could have saved millions of dollars in attorney fees will be the individuals primarily disadvantaged by this rule change.

Direct mail advertising permits attorneys to send truthful, non-deceptive letters to individuals known to have a particular legal need. Imposing a thirty day waiting period will mean that by the time a potential client receives a letter, they will have more than likely already been contacted by a insurance company and may have hired one of the major advertising law firms. Assuming our firm continues to engage in direct mail marketing after waiting the required thirty days, a prospective client will then receive a letter offering a lower fee after they have already hired an attorney. This will most certainly result in more than a few clients asking to fire their present lawyer and hire our firm so they can take advantage of the lower fee. Our office has vehemently opposed a client leaving their present lawyer to hire us because we offer a reduce fee. We have uniformly rejected potential clients who wanted to transfer lawyers when their only motivation for doing so was our lower fee.

It is difficult to understand how a thirty day waiting period is a benefit to the client (who will no longer have the offer of a reduced fee) or the legal profession. The unintended consequence of this thirty day waiting period is to reduce consumer choice as opposed to protect the consumer.

In *Florida Bar v. Went For It, Inc. 515 U.S. 618 (1995),* The Florida Bar expressed concern about how the legal profession would be viewed in the absence of the imposition of a thirty day waiting period on direct mail marketing. The State of Michigan has had another seventeen years of experience with direct mail marketing since *Florida*

Bar v Went For It, Inc. was decided. There are no State Bar of Michigan studies suggesting that the legal profession is viewed less favorably as a consequence of direct mail marketing. There is no empirical or anecdotal evidence suggesting that a thirty day waiting period is desirable. I am unaware of any Attorney Discipline Board formal complaints involving an abuse of direct mail. In my capacity as an Attorney Discipline Board Hearing Panel Chairperson, I am unaware of any formal complaints against any advertising lawyers as it relates to direct mail. There is simply no compelling reason why the Supreme Court should impose a thirty day waiting period on the use of direct mail marketing. There are many compelling reasons to oppose such a rule change. Assuming a thirty day waiting period is imposed, the winners will be the larger advertising attorneys who will eliminate the competition from our firm and others who seek to compete with the larger advertising firms by offering better service at a lower fee. The losers will, as always, be the clients.

OPPOSITION TO THE PROPOSAL THAT "EVERY COMMUNICATION FROM A LAWYER DESCRIBED IN SUBSECTION (1)(2) SHALL INCLUDE THE WORDS "ATTORNEY ADVERTISING MATERIAL ON THE OUTSIDE ENVELOPE..."

Attorneys who engage in direct mail marketing have taken great pains to ensure that their advertising and marketing materials are not mistaken for a business letter from a lawyer. Attached to this letter is a copy of the envelope our firm sends to prospective clients enclosing our brochure, cover letter and other marketing materials. There is simply no way this type of correspondence can be interpreted as anything other than "advertising material." As far as I know, all of the other attorneys that engage in direct mail marketing utilize a similar approach in their correspondence. Requiring that this correspondence be labeled "advertising material" is simply a solution in search of a problem.

Respectfully submitted,

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